IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CRAIG M. CARTER,
Appellant.

No. 2 CA-CR 2018-0157
Filed November 19, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20151815001
The Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By David J. Euchner and Trevor R. Hill,
Assistant Public Defenders, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 Craig Carter appeals his convictions of aggravated assault. For the reasons that follow, we affirm.

Factual and Procedural History

¶2 "We view the evidence in the light most favorable to sustaining the convictions." *State v. Gay*, 214 Ariz. 214, ¶ 2 (App. 2007). At trial, B.G., a student-athlete at the University of Arizona, testified she and her coach, Carter, had been engaged in an intimate relationship for some time. When B.G. informed Carter she did not want to remain in Tucson, he sent a series of threatening text messages, including one ordering her to go to his office "if [she] want[ed] to live." After she arrived, they argued and he pinned her to the couch, holding her around the neck with one hand while holding a box cutter to her face with the other hand. As he did so, he threatened to "cut [her] face up so no one else will like [her] or look at [her]." B.G. testified she could not breathe during the attack.

¶3 Carter did not testify at trial, but the state played for the jury and introduced into evidence his recorded interview with a university police detective, in which he admitted to grabbing B.G. by the neck and threatening to cut her face with a box cutter. The state also presented several voicemail messages Carter had left for B.G. following the incident in which he apologized, stated he had "flipped," promised never to touch her again, and asked her not to call the police. Additionally, the state presented messages exchanged between Carter and B.G. after the incident, in which B.G. described the attack, including an email in which she told Carter: "you put your hand around my neck with a razor blade at me." Carter's response to the email did not deny B.G.'s allegations.

¶4 The jury found Carter guilty of aggravated assault by strangulation and aggravated assault with a dangerous instrument.[1] The trial court sentenced him to concurrent, mitigated prison terms, the longer of which is five years. Carter's timely appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Preclusion of Evidence

¶5 Carter argues the trial court abused its discretion by precluding from evidence a series of messages sent between B.G. and Carter over the three years preceding the attack. Carter intended to offer the messages to rebut evidence offered by B.G. showing that features of the relationship were not consensual and to impeach B.G.'s overall credibility. The trial court precluded the messages, reasoning the nature of the relationship was not relevant to the two assault charges at issue.[2] On appeal, Carter argues the preclusion deprived him of his constitutional rights to cross-examine a witness and to present a full defense.

¶6 We review a trial court's exclusion of evidence for abuse of discretion. *State v. Lopez*, 234 Ariz. 465, ¶ 19 (App. 2014). We review evidentiary rulings that implicate the Confrontation Clause *de novo*. *Lilly v. Virginia*, 527 U.S. 116, 137 (1999). Because Carter preserved this issue, we review for harmless error. *State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005).

¶7 "The right of cross-examination is a vital part of the right of confrontation conferred by the Sixth Amendment." *State v. Fleming*, 117 Ariz. 122, 125 (1977). However, "[t]rial courts retain wide latitude to impose reasonable limits on cross-examination to prevent confusion of the issues or interrogation that is only marginally relevant." *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 8 (App. 2013). These limits become unconstitutional only when they deny a defendant "the opportunity to present 'information which bears either on the issues in the case or on the

[1] Carter faced two other criminal charges stemming from this incident—stalking and interference with or disruption of a public institution—which the trial court severed upon Carter's motion.

[2] The state originally charged the assaults as domestic-violence offenses. However, after a hearing regarding the admission of the text messages at issue here, the state withdrew the allegations of domestic violence. The trial court cited the dropping of the domestic-violence allegations in its reasoning for precluding the messages.

credibility of the witness.'" *State v. Moody*, 208 Ariz. 424, ¶ 137 (2004) (quoting *Fleming*, 117 Ariz. at 125).

¶8 "[T]he constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to" harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *see also State v. Almaguer*, 232 Ariz. 190, ¶¶ 25-26 (App. 2013) (preclusion of evidence harmless where other impeachment evidence was allowed at trial and witness's testimony was not the state's sole evidence). We consider "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684.

¶9 Here, the state presented overwhelming evidence, apart from B.G.'s testimony, to secure the jury's finding of guilt. *See Almaguer*, 232 Ariz. 190, ¶ 26 (finding harmlessness in context of "strong, if not overwhelming, evidence of guilt"). This included the recorded interview in which Carter admitted he had grabbed B.G. by the neck, pulled a box cutter from his pocket, and told her he would hurt her. Carter did not recant this admission at trial. Rather, during closing arguments Carter's counsel specifically referred to the portion of the interview in which Carter described the attack.

¶10 The state also presented several emails exchanged between Carter and B.G. in the days following the assaults that corroborated material details of B.G.'s accusations. For example, two days after the incident, Carter emailed B.G.: "I know you always had that standard that if a guy touch[ed] you that you would never be with him." The next email, sent by B.G. three minutes later, replied: "It doesn't matter how big the fight is or what was even said you put your hand around my neck with a razor blade at me. I am done. Leave me alone that is what I want." Among his several responses to that email, Carter wrote, "I know what I did, and all I can do is tell you I'm sorry and that I will never touch you again," and "I'm not an abusive person, you have to believe. Pleas[e]." None of his responses contradicted B.G.'s description of the attack.

¶11 Furthermore, to the extent the proffered messages may have cast doubt on the reliability of B.G.'s testimony about her relationship with Carter, it was cumulative to other admitted evidence offered by the defense to serve the same purpose. *See Van Arsdall*, 475 U.S. at 684. B.G.'s credibility

as a witness was key to the defense's theory of the case. Carter cross-examined B.G. extensively with respect to whether the relationship was consensual, and the nature of their relationship permeated much of his closing argument, notwithstanding its tenuous relevance to Carter's guilt. And, Carter leveled a series of questions toward B.G. during cross-examination suggesting she had manufactured the non-consensual nature of the relationship during interviews with national news media. Carter also attempted to cast doubt on B.G.'s claims that the relationship was non-consensual through his cross-examination of B.G.'s friend and teammate. Because Carter was permitted to impeach B.G.'s credibility in these ways, any further evidence undermining her credibility on this point would have been cumulative. Thus, we conclude any error in precluding additional evidence regarding the nature of the relationship between B.G. and Carter was surely harmless, particularly in view of his own admissions of guilt.

Prior Consistent Statements

¶12 Carter argues the trial court erroneously allowed the state to introduce, through the testimony of B.G.'s friend and teammate, B.G.'s prior consistent statements regarding certain events in Eugene, Oregon. Those statements suggested B.G.'s relationship with Carter was not consensual. Carter argues these prior consistent statements were inadmissible because they were not elicited in response to a charge of recent fabrication or improper motive, and they were introduced merely to bolster B.G.'s credibility as a witness. Specifically, Carter argues that B.G.'s statements were not recent fabrications, and thus they do not fall within the hearsay exception provided in Rule 801(d)(1)(B)(i), Ariz. R. Evid.

¶13 We review a trial court's admission of evidence under exceptions to the rule against hearsay for abuse of discretion. *State v. Tucker*, 205 Ariz. 157, ¶ 41 (2003). Rule 801(d)(1)(B)(i) provides that prior consistent statements are admissible as non-hearsay "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying." To be admissible, the prior consistent statement must have been made before the motive to fabricate arose. *State v. Martin*, 135 Ariz. 552, 553 (1983). "The word 'recent' in the term recent fabrication means that the witness is charged not with mistake or confusion but with making up a false story well after the event." *In re Maricopa Cty. Juv. Action No. JV-133607*, 186 Ariz. 198, 201 (App. 1996) (quoting *Scarborough v. Schenck Transp. Co., Inc.*, N.Y.S.2d 825, 827 (Sup. Ct. 1974)). Although "[d]eveloping and demonstrating inconsistencies in a witness's testimony does not necessarily amount to a charge of recent

fabrication," *id*., questioning that raises an inference that "the witness had a reason to fabricate her story later" satisfies Rule 801(d)(1)(B), *id*. (quoting *State v. Bargas*, 763 P.2d 470, 472 (Wash. Ct. App. 1988)).

¶14 We find no error in the admission of B.G.'s prior consistent statements. B.G. made the statements in question on April 20, 2015, just before the attack. Defense counsel informed the court that B.G.'s motive to fabricate arose no earlier than May 6, 2015. Thus, B.G. uttered the statements before any alleged motive to fabricate arose. And, Carter's cross-examination of B.G. strongly implied that she had cause to fabricate her story: while questioning B.G. about when she had informed the university detective about the events in Eugene, defense counsel abruptly asked B.G. when she had retained counsel and filed a related civil suit. This line of questioning raised an inference that B.G. had developed a motive to fabricate after retaining counsel and after making the prior consistent statements in question. Therefore, we find no error in the court's admission of the statements as non-hearsay under Rule 801(d)(1)(B).

Consciousness-of-Guilt Jury Instruction

¶15 Carter also argues the trial court abused its discretion by instructing the jury that, in considering Carter's guilt, it could "consider any evidence of the defendant's hiding or concealing evidence, together with all the other evidence in the case," as well as "the defendant's reason for hiding or concealing evidence." The instruction related to Carter's admission to the university police detective that he threw the box cutter used to threaten B.G. out the window of his vehicle while driving on the interstate. Over Carter's objection, the court ruled that, together with evidence that Carter had left a voicemail for B.G. asking her not to tell the police about the attack, the disposal of the box cutter was sufficient to support a so-called "consciousness-of-guilt instruction." *State v. Van Alcorn*, 136 Ariz. 215, 218 (App. 1983).

¶16 On appeal, Carter argues his disposal of the box cutter did not suggest his consciousness of guilt. He further argues "the box cutter itself had no evidentiary value in this case" because he was known to habitually carry it for use in his coaching duties, and therefore the instruction "served only to invite the jury to speculate about nonissues" unrelated to whether he intentionally used the blade to threaten B.G., the elements of the second aggravated assault charge.

¶17 We review for abuse of discretion a trial court's decision to give or deny a jury instruction. *State v. Solis*, 236 Ariz. 285, ¶ 6 (App. 2014).

A consciousness-of-guilt instruction is appropriate when a defendant flees from the scene of a crime or attempts concealment in a manner suggesting an awareness of guilt. *State v. Hunter*, 136 Ariz. 45, 48-49 (1983). For instance, our supreme court has upheld such an instruction when a defendant has openly fled from the scene of a crime, *State v. Lujan*, 124 Ariz. 365, 371 (1979); when a defendant has acted to conceal his connection to the scene of a crime, *State v. Salazar*, 173 Ariz. 399, 409 (1992); and when a defendant has concealed himself to avoid discovery after committing a crime, *State v. Garcia*, 102 Ariz. 468, 472 (1967). Similarly, this court has described the concealment of evidence as "conduct which may indicate a consciousness of guilt." *Van Alcorn*, 136 Ariz. at 218.

¶18 The trial court did not abuse its discretion when it provided the consciousness-of-guilt instruction here. The state presented evidence that Carter had thrown his box cutter—a tool he used daily in his job—out the window of a vehicle while driving on the interstate, after he told B.G. not to contact the police. This manner of disposing of a weapon used to commit a crime supports an inference of his consciousness of guilt. Throwing a weapon out the window of a moving car suggests an attempt to make the box cutter difficult, if not impossible, to locate; it also suggests an effort to dissociate himself from that weapon. This evidence alone was sufficient to warrant the consciousness-of-guilt instruction.

¶19 Even had the trial court erred in giving this instruction, such error would have been harmless. *See Henderson*, 210 Ariz. 561, ¶ 18. As outlined above, there was ample evidence supporting Carter's conviction, including his own recorded admission that he had threatened B.G. with a box cutter, as well as the inculpatory emails he exchanged with B.G., which corroborated the material portions of Carter's admission.

Disposition

¶20 For the foregoing reasons, we affirm.